

November 21, 2019

VIA ECF

The Honorable Lorna G. Schofield  
U.S. District Court  
Southern District of New York  
Thurgood Marshall U.S. Courthouse  
40 Foley Square  
New York, New York 10007

Re: *Contant, et al. v. Bank of Am. Corp., et al.*,  
No. 17 Civ. 3139 (LGS) (S.D.N.Y.)

Dear Judge Schofield:

Pursuant to this Court's November 16, 2018 Order (ECF No. 176), the parties write to update the Court on the status of the above-captioned action.

**I. Additional Settlements**

Plaintiffs reached settlements with two additional defendants following this Court's entry of an Order preliminarily approving settlements with Citigroup and MUFG Bank, Ltd. ("MUFG"). (ECF No. 297.) Plaintiffs notified the Court of the two additional settlements by letters to chambers on August 13, 2019, and October 7, 2019, and requested that the letters not be filed on the public docket because the settlements were not yet public. As set forth in plaintiffs' November 15, 2019, letter motion requesting that the Court stay the settlement schedule deadlines for the Citigroup and MUFG settlements, plaintiffs anticipate that they will move for preliminary approval of the two additional settlements in the coming days.

**II. Pleadings and Pending Motions**

A. Plaintiffs' Motion for Leave to File a Third Consolidated Class Action Complaint

On July 25, 2019, plaintiffs filed a pre-motion letter requesting leave to amend the operative complaint in the form of a Third Consolidated Class Action Complaint, which would include new jurisdictional allegations as to The Royal Bank of Scotland plc ("RBS"). (ECF No. 293.) On July 26, 2019, this Court ordered that by August 2, 2019, plaintiffs submit (1) an unredacted copy of the proposed amended complaint to the Chambers inbox, (2) a blackline version indicating all changes from the last complaint filed, and (3) an application to file the proposed amended complaint in redacted form. (ECF No. 295.) Plaintiffs submitted these materials on August 2, 2019.

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On August 5, 2019, the Court granted plaintiffs' request to file their proposed Third Consolidated Class Action Complaint in redacted form on ECF. (ECF 303.) That same day, plaintiffs filed their redacted proposed amended complaint on ECF. (ECF No. 304.) On August 9, 2019, RBS filed a letter response in opposition to plaintiffs' pre-motion letter for leave to amend. (ECF No. 308.) On August 21, 2019, plaintiffs filed a reply letter in support of their pre-motion letter for leave to amend. (ECF No. 312.) Plaintiffs' pre-motion letter for leave to amend is currently pending before the Court.

B. Plaintiffs' Motion to Stay the Settlement Deadlines for the Citigroup and MUFG Settlements

On July 29, 2019, this Court entered an Order preliminarily approving settlements with Citigroup and MUFG, preliminarily certifying the settlement classes, and appointing settlement class representatives and settlement class counsel. (ECF No. 297.) On November 15, 2019, plaintiffs filed a letter motion requesting that the Court stay the settlement deadlines for the Citigroup and MUFG settlements as set forth in the Court's Preliminary Approval Order (ECF No. 297.) (ECF No. 333.) Plaintiffs stated that in the months following preliminary approval of the Citigroup and MUFG settlements, they reached two additional settlements and anticipated moving for preliminary approval of the additional settlements soon. Plaintiffs explained that the relief requested was warranted because: (a) it would be more efficient and less costly to disseminate a single notice for all four settlements reached to date and would avoid confusion of the Settlement Classes resulting from distinct but nearly identical and successive settlement notices; and (b) despite plaintiffs' pursuit of customer contact information and transactional data from the retail foreign exchange dealers ("RFEDs") that operated in the U.S. during the Class Period, such as FXCM and GAIN Capital, much of that information has yet to be produced, although plaintiffs had received productions from FXDirectDealer, LLC ("FXDD") and Peregrine Financial Group, Inc. ("PFG"). *Id.* Plaintiffs noted in their motion that several factors beyond plaintiffs' control have delayed the productions of certain RFEDs, including technical issues specific to individual RFEDs, and disputes with RFEDs regarding cost shifting. *Id.* at 2. On November 19, the Court granted the stay request and directed plaintiffs to submit a proposed revised settlement schedule timeline by November 22, 2019. (ECF No. 334.)

C. Defendants' Answers to the Second Consolidated Class Action Complaint

On January 11, 2019, Non-Foreign Defendants filed answers to plaintiffs' Second Consolidated Class Action Complaint. (*See* ECF Nos. 205-216.) Standard Chartered Bank, Barclays Bank PLC, BNP Paribas Group, HSBC Bank PLC, and UBS AG filed their answers on June 3, 2019. (*See* ECF Nos. 279-283.)

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D. Plaintiffs' and Defendants' Motion to Compel Production from Non-Party FXCM

On November 12, 2019, plaintiffs filed a pre-motion letter to request that the Court compel a non-party—Forex Capital Markets, LLC (“FXCM”)—to comply with plaintiffs’ subpoena for production of documents dated March 7, 2019. (ECF No. 325.) On November 13, 2019, the Court referred this motion to the Honorable Stewart D. Aaron, United States Magistrate Judge. (ECF No. 327.) On November 14, 2019, HSBC filed a letter indicating that HSBC also anticipated filing a pre-motion letter to compel production of certain documents from FXCM. (ECF No. 329.) On November 15, 2019, after being ordered to submit an agreed-upon joint briefing schedule on the motion to compel (*see* ECF No. 330), HSBC filed a proposed agreed-upon briefing schedule for the pre-motion letter seeking to compel FXCM to produce certain documents (ECF No. 331), which was then so-ordered by Judge Aaron (ECF No. 332). This briefing schedule provides: (1) by November 19, 2019, HSBC must file its pre-motion letter to compel; (2) by November 27, 2019, FXCM must respond to both pre-motion letters to compel filed by plaintiffs and HSBC; and (3) by December 6, 2019, plaintiffs and HSBC must file their replies in support of their motions to compel. HSBC filed its letter motion to compel on November 19, 2019. (ECF No. 335.)

### III. Discovery

A. Production of Documents

Pursuant to this Court’s November 16, 2018 Order (ECF No. 176), Non-Foreign Defendants produced to plaintiffs documents and recordings produced in discovery in *In re Foreign Exchange Benchmark Rates Antitrust Litigation* (S.D.N.Y. No. 13-cv-7789) (“FOREX”), as well as transactional data for spot FX Instrument transactions with entities identified as RFEDs by plaintiffs in November 21, 2018 and December 21, 2018 correspondence. On May 10, 2019, defendants produced *FOREX* plaintiffs’ redacted expert reports filed in connection with *FOREX* plaintiffs’ motion for class certification. Discovery was stayed as to Foreign Defendants until the Court’s ruling on their joint Rule 12(b)(2) motion to dismiss. After this Court’s ruling, on June 20, 2019, UBS AG, HSBC Bank plc, and Standard Chartered Bank similarly produced to plaintiffs documents and recordings produced in discovery in *FOREX*, as well as transactional data for spot FX Instrument transactions with entities identified as RFEDs by plaintiffs in correspondence dated November 21, 2018 and December 21, 2018.

On March 11, 2019, Non-Foreign Defendants served a first set of requests for production on plaintiffs and on May 1, 2019, plaintiffs served their responses and objections. On July 31, 2019, plaintiffs substantially completed their production of non-ESI documents in response to Non-Foreign Defendants’ first set of requests and on

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August 29, plaintiffs produced ESI documents in response to those requests. Plaintiffs made supplemental productions on August 30, September 6, September 12, September 13, September 20, September 27, October 1, October 3, November 8, and November 18, 2019. The parties continue to meet and confer on these requests.

On September 11, 2019, plaintiffs sent a letter to the Goldman Sachs Defendants with certain questions and requests regarding the Goldman Sachs productions of transactional data. The Goldman Sachs Defendants responded on September 30, 2019. Plaintiffs sent similar letters to Bank of America, BNP Paribas, Credit Suisse, Deutsche Bank, Morgan Stanley, and UBS on September 27; and to Barclays, JPMorgan, and RBS Securities Inc. on October 6, 2019. Responses were sent by BNP Paribas, Credit Suisse, and Deutsche Bank on October 11, 2019; JPMorgan on October 16, 2019; UBS on October 21, 2019; Bank of America on October 24, 2019; RBS Securities Inc. on October 25, 2019; and Morgan Stanley on November 6, 2019.

On October 7, 2019, plaintiffs served their first sets of requests for production on defendants Bank of America, Barclays Bank PLC, Barclays Capital Inc., BNP Paribas, Credit Suisse, Deutsche Bank, Goldman Sachs, HSBC, JPMorgan, Morgan Stanley, RBS Securities Inc., Standard Chartered, and UBS. On November 6, 2019, Bank of America, Barclays Bank PLC, Barclays Capital Inc., BNP Paribas, Credit Suisse, Deutsche Bank, Goldman Sachs, HSBC, JPMorgan, Morgan Stanley, RBS Securities Inc., and UBS served responses and objections to these requests.

#### B. Initial Disclosures

Plaintiffs and Non-Foreign Defendants exchanged initial disclosures on February 11, 2019. On June 17, 2019, HSBC Bank plc served initial disclosures on plaintiffs, followed by UBS AG and BNP Paribas (SA), both of whom served their initial disclosures on June 27, 2019. Initial disclosures were then served by Standard Chartered Bank on July 3, 2019 and by Barclays Bank PLC on July 16, 2019.

#### C. Interrogatories

On February 11, 2019, defendants BNP Paribas US Wholesale Holdings Corp. and BNP Paribas Securities Corp. served a first interrogatory on plaintiffs, to which plaintiffs served their responses and objections on March 13, 2019. On March 11, 2019, The Goldman Sachs Group, Inc. and Goldman Sachs & Co. LLC also served a first set of interrogatories on plaintiffs, as did Deutsche Bank AG and Deutsche Bank Securities Inc., to which plaintiffs served their responses and objections on May 1, 2019. On June 17, 2019, defendants JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A. served a first set of interrogatories on plaintiffs. On July 19, 2019, plaintiffs served their responses and objections to JPMorgan's interrogatories and on July 25, 2019, plaintiffs

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served their amended responses and objections. On July 26, 2019, plaintiffs served a supplemental amended response to BNP's interrogatory. On September 19, 2019, defendants JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A. served a second set of interrogatories on plaintiffs. On October 21, 2019, plaintiffs served their responses and objections to JPMorgan's second set of interrogatories.

On April 2, 2019, plaintiffs served a first interrogatory on defendants. On May 2, 2019, responses and objections to this interrogatory were served by BNP Paribas US Wholesale Holdings Corp. and BNP Paribas Securities Corp.; Bank of America Corporation, Bank of America, N.A., and Merrill Lynch, Pierce, Fenner & Smith Incorporated; Barclays Bank PLC and Barclays Capital Inc.; Credit Suisse AG and Credit Suisse Securities (USA) LLC; Deutsche Bank AG and Deutsche Bank Securities Inc.; The Goldman Sachs Group, Inc. and Goldman Sachs & Co. LLC; HSBC North America Holdings, Inc., HSBC Bank USA, N.A., and HSBC Securities (USA) Inc.; JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A.; Morgan Stanley, Morgan Stanley & Co., LLC, and Morgan Stanley & Co. International plc; RBC Capital Markets, LLC; RBS Securities Inc.; and UBS Securities LLC.

#### D. Depositions

Certain defendants have served notices of depositions for all eleven named plaintiffs. The parties have agreed to the dates and locations of the depositions for nine of these plaintiffs—Charles Hitchcock on November 25, 2019, Paul Vermillion and Victor Hernandez both on December 2, Tina Porter and Martin Han-Tran both on December 4, Sandra Lavender on December 9, 2019, James Contant on December 17, 2019, and Carlos Gonzalez and Ugnius Matkus both on December 19, 2019. The parties continue to negotiate the scheduling of the remaining depositions of named plaintiffs.

#### E. Third Party Discovery

Third Party Discovery by Plaintiffs: On March 14, 2019, plaintiffs initiated service of subpoenas on sixty-one third parties that plaintiffs believe to have engaged in retail foreign exchange transactions. The parties have generally referred to entities engaged in retail foreign exchange transactions with plaintiffs and the proposed classes transacted as "RFEDs." That designation is shorthand. Prior to amendments to the Commodity Futures Trading Commission's regulations which became effective on October 18, 2010, entities that engaged in retail foreign exchange transactions with retail customers were not required to register as RFEDs. Following October 18, 2010, unless subject to an exemption, entities that engage in retail foreign exchange transactions are required to register as an RFED pursuant to Sections 2(c)(2)(B) or 2(c)(2)(C) of the Commodity Exchange Act. Because the class period spans from December 1, 2007 through December 31, 2013, the retail foreign exchange dealers with whom plaintiffs and

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members of the classes may have transacted may have never registered as RFEDs even if they engaged in retail foreign exchange transactions.

On April 11, 2019, FXDD filed a motion to quash the subpoena served upon it by plaintiffs (ECF No. 251), which this Court denied on April 18, 2019 (ECF No. 254). On June 27, 2019, plaintiffs mailed letters to eight RFEDs that failed to respond to plaintiffs' subpoenas by their specified production deadlines. On October 9, 2019, the trustee for PFG produced over 300 GB of data consisting of approximately 4 million documents on October 9, 2019. Plaintiffs are negotiating the scope and manner of responsive productions with counsel for FXDD and other RFEDs that timely served responses and objections to plaintiffs' subpoenas. Consistent with independent research, counsel for those RFEDs have represented to plaintiffs that the RFED market was highly concentrated during the class period, and therefore a substantial majority of all RFED transactions were carried out by a small number of large RFEDs. Those large RFEDs include FXCM, FXDD, GAIN Capital, and OANDA Corporation, all of which have already produced or have indicated to plaintiffs that they intend to produce documents and data responsive to plaintiffs' subpoenas. Plaintiffs primarily transacted with PFG, FXCM, FXDD, and OANDA, all of whom plaintiffs have received data from or, expect to receive data from.

Third Party Discovery by Defendants: Since April 5, 2019, defendants have initiated service of subpoenas on fifty-eight third parties that plaintiffs have identified as RFEDs, including eleven entities with which named plaintiffs assert they transacted. Nine of those fifty-eight entities have made productions to defendants,<sup>1</sup> although only three of those nine entities have produced transaction data. Based on declarations, letters, and statements received to date, at least seventeen of these fifty-eight third parties did not engage in retail foreign exchange operations during the relevant period, December 1, 2007 through December 31, 2013.<sup>2</sup> Additional entities have similarly represented that they did not in fact operate as RFEDs, and defendants anticipate receiving declarations

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<sup>1</sup> These nine entities include (1) Advanced Markets LLC; (2) Charles Schwab Futures, Inc.; (3) FXDirectDealer, LLC; (4) Hotspot FXR, LLC; (5) Institutional Liquidity Holdings, LLC (n/k/a/ Navitas Investments, LLC); (6) Peregrine Financial Group, Inc.; (7) Phillip Capital Inc.; (8) R.J. O'Brien & Associates, LLC; and (9) Tradestation, the succeeding entity to four other entities identified as RFEDs by plaintiffs (TradeStation FOREX, Inc., TradeStation Securities, Inc., Interbank FX, LLC, and IBFX Inc.)

<sup>2</sup> These entities include (1) ABN AMRO Clearing Chicago, LLC; (2) Advantage Futures, LLC; (3) AMP Global Clearing, LLC; (4) Dorman Trading LLC; (5) E\*Trade Futures, LLC; (6) eToro USA LLC; (7) Jefferies, LLC; (8) KCG Americas LLC; (9) Knight Capital Americas LLC; (10) Knight Execution and Clearing Services LLC; (11) Newedge USA, LLC; (12) Penson Financial Services; (13) Penson Futures; (14) Phillip Capital Inc.; (15) Straits Financial LLC; (16) Wedbush Securities, Inc.; and (17) York Business Associates (d/b/a TransAct Futures).



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from those entities to that effect in the near future. Moreover, research reflects that some entities that neither plaintiffs nor defendants were able to serve or contact did not operate as RFEDs.<sup>3</sup> Further, it appears that many of the entities identified by plaintiffs as purported RFEDs will be unable to produce responsive documents or trade data, whether due to document retention policies or because they have ceased operations and no longer possess these records.<sup>4</sup> Other entities appear defunct or have otherwise ceased operations such that neither plaintiffs nor defendants have been able to successfully serve them.<sup>5</sup>

On March 13, 2019, the eleven named plaintiffs, in response to an interrogatory, disclosed eleven purported RFEDs with which they transacted. Based on the discovery to date, three of these entities are domiciled and operate exclusively abroad and have not been subpoenaed by either plaintiffs or defendants.<sup>6</sup> Of the remaining eight, two have been dissolved,<sup>7</sup> one is in bankruptcy following revelation of fraud,<sup>8</sup> and two are operating outside the United States after being banned from U.S. operations by the CFTC.<sup>9</sup> Although defendants continue to meet and confer with many of the remaining entities that plaintiffs identified as RFEDs, a number of these entities have informed

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<sup>3</sup> For example, ACM (USA), LLC was never registered as an RFED, Forex Firm, or Forex Dealer Member with the National Futures Association.

<sup>4</sup> For example, R.J. O'Brien & Associates, LLC advised defendants that due to a five-year document retention policy, they have been unable to identify many responsive documents. TradeStation FOREX, TradeStation Securities, IBFX, and Interbank FX have similarly stated that any transaction data they could produce will likely be limited to data from 2011 onward. Advanced Markets LLC likewise stated that any production would be quite limited due to document destruction policies. Capital Market Services LLC and MB Trading Futures, Inc. have long since ceased operations and also have no transaction data in their possession.

<sup>5</sup> For example, CMC Markets (US) LLC, GFS Forex & Futures, Inc., IKON Global Markets, Inc., and Solid Gold Financial Services Inc., and Wall Street Derivatives.

<sup>6</sup> Dukascopy Bank, SA, HF Markets Ltd., and FOREX Capital Markets Ltd. (UK).

<sup>7</sup> Alpari (US), LLC and CFS Capital Management LLC.

<sup>8</sup> Plaintiffs and Defendants negotiated for the production of certain Peregrine Financial Group, Inc. ("PFG") documents by PFG's bankruptcy trustee. PFG expects to make its first production to Plaintiffs and Defendants by Friday, October 11.

<sup>9</sup> Forex Capital Markets LLC and FXDirectDealer, LLC. Alpari (US), LLC, Peregrine Financial Group, Inc., FOREX Capital Markets Ltd. (UK) and CFS Capital Management LLC were also penalized by the CFTC and/or NFA for misconduct including fraudulent marketing and misappropriation of customer funds.

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defendants that they have had little or no contact with plaintiffs.<sup>10</sup> At least six of these entities have represented that they had not received subpoenas from plaintiffs.<sup>11</sup>

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Pursuant to this Court's May 2, 2019 Order (ECF No. 259), the fact discovery deadline has been extended to February 3, 2020 and the case management conference originally scheduled for May 16, 2019, has been adjourned to January 9, 2020. In light of that Order, pre-motion letters in support of dispositive and class certification motions are due on December 26, 2019 (no later than two weeks before the January 9, 2020 case management conference, ECF No. 258).

Plaintiffs note for the Court that they will soon move for an extension of the pending class certification and fact discovery deadlines. Defendants note that they would object to this request.

Respectfully submitted,

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<sup>10</sup> These entities include Capital Market Services, FCStone LLC, and Phillip Capital Inc.

<sup>11</sup> These entities include Hotspot FXR, LLC, IG Markets, Inc., KCG Americas LLC, Knight Execution and Clearing Services LLC, Knight Capital Americas LLC, and Phillip Capital Inc.



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